BRB No. 07-0260

W.W.	)	
	)	
Claimant	)	
	)	
v.	)	
	)	
NEWPORT NEWS SHIPBUILDING AND DRY DOCK COMPANY	)	DATE ISSUED: 11/21/2007
	)	
	)	
Self-Insured Employer-Petitioner	)	
	)	
DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR	)	
	)	
	)	
Respondent	)	DECISION and ORDER

Appeal of the Decision and Order of Richard K. Malamphy, Administrative Law Judge, United States Department of Labor.

Jonathan H. Walker (Mason, Mason, Walker & Hedrick, P.C.), Newport News, Virginia, for self-insured employer.

Emily Goldberg-Kraft (Jonathan L. Snare, Acting Solicitor of Labor; Allen H. Feldman, Associate Solicitor; Mark A. Reinhalter, Counsel for Longshore), Washington, D.C., for the Director, Office of Workers' Compensation Programs, United States Department of Labor.

Before: DOLDER, Chief Administrative Appeals Judge, McGRANERY and BOGGS, Administrative Appeals Judges.

PER CURIAM:

Employer appeals the Decision and Order (2006-LHC-0317) of Administrative Law Judge Richard K. Malamphy rendered on a claim filed pursuant to the provisions of the Longshore and Harbor Workers' Act, as amended, 33 U.S.C. §901 *et seq.* (the Act). We must affirm the findings of fact and conclusions of law of the administrative law

judge which are rational, supported by substantial evidence and in accordance with law. *O'Keeffe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359 (1965); 33 U.S.C. §921(b)(3).

Claimant, a pipefitter, was employed by employer from 1956 to 1960 during which time he was exposed to airborne asbestos dust and fibers; he was diagnosed as suffering with asbestosis on November 24, 1998. Claimant and employer stipulated that claimant is entitled to permanent partial disability benefits under Section 8(c)(23) of the Act, 33 U.S.C. §908(c)(23), for a ten percent respiratory impairment, commencing on November 24, 1998. EX 6. Subsequently, employer sought relief from continuing compensation liability pursuant to Section 8(f), 33 U.S.C. §908(f).

In his Decision and Order, the administrative law judge denied such relief. He found that although the Director, Office of Workers' Compensation Programs, conceded that claimant's diabetes, hypertension and heart disease constitute pre-existing permanent partial disabilities, employer failed to establish the contribution element necessary for Section 8(f) relief. Employer appeals the administrative law judge's denial of relief under Section 8(f). The Director responds, urging affirmance.

Section 8(f) shifts the liability to pay compensation for permanent disability after 104 weeks from employer to the Special Fund established in Section 44 of the Act, 33 U.S.C. §§908(f), 944. An employer may be granted Special Fund relief in a case where a claimant is permanently partially disabled if it establishes that the claimant had a manifest, pre-existing permanent partial disability, and that his current permanent partial disability is not due solely to the subsequent work injury and is "materially and substantially greater than that which would have resulted from the subsequent work injury alone."[1] 33 U.S.C. §908(f)(1); *Director, OWCP v. Newport News Shipbuilding & Dry Dock Co. [Harcum]*, 8 F.3d 175, 27 BRBS 116(CRT) (4th Cir. 1993), *aff'd*, 514 U.S. 122, 29 BRBS 87(CRT) (1995); *see also Director, OWCP v. Newport News Shipbuilding & Dry Dock Co. [Carmines]*, 138 F.3d 134, 32 BRBS 48(CRT) (4th Cir. 1998). In *Harcum*, the United States Court of Appeals for the Fourth Circuit, within whose jurisdiction this case arises, held that in order to satisfy this requirement, employer must quantify the level of impairment that would ensue from the work-related injury alone. *Id.*, 8 F.3d at 185, 27 BRBS at 130-131(CRT). In *Carmines*, 138 F.3d 134, 32 BRBS 48(CRT), the court explained that without the quantification of the disability due solely to the subsequent injury, it is impossible for the administrative law judge to determine

[1] As this case arises in the Fourth Circuit, the manifest element is inapplicable since claimant suffers from a post-retirement occupational disease. *Newport News Shipbuilding & Dry Dock Co. v. Harris*, 934 F.2d 548, 24 BRBS 190(CRT) (4th Cir. 1991).

whether claimant's ultimate disability is materially and substantially greater than it would have been without the pre-existing disability. *See also Newport News Shipbuilding & Dry Dock Co. v. Pounders*, 326 F.3d 455, 37 BRBS 11(CRT) (4th Cir. 2003); *Newport News Shipbuilding & Dry Dock Co. v. Winn*, 37 BRBS 29(CRT) (4th Cir. 2003).

Employer contends that it is entitled to Section 8(f) relief based upon claimant's pre-existing heart disease, uncontrolled hypertension, diabetes, and obesity. Claimant suffered two myocardial infarctions which resulted in his retirement from work in 1984 and led to a stroke in 1996. EXs 1, 2. Claimant also has been diagnosed with hypertension and diabetes and obesity. EX 2. The administrative law judge found that the opinion of Dr. Donlan is insufficient to establish the contribution element. Dr. Donlan stated that claimant's pre-existing conditions contribute to his overall disability and that claimant's impairment would be 40 percent less if these conditions did not exist. EX 5-2.

We reject employer's contention that the administrative law judge's decision does not contain a sufficient rationale for his rejection of Dr. Donlan's opinion. The administrative law judge rationally found that Dr. Donlan did not explain how claimant's disabling pre-existing conditions played a contributory role in claimant's compensable ten percent respiratory impairment. *See Richardson v. Newport News Shipbuilding & Dry Dock Co.*, 39 BRBS 74 (2005), *aff'd on other grounds mem. sub nom. Newport News Shipbuilding & Dry Dock Co.*, No. 05-2418, 2007 WL 2316202 (4th Cir. Aug. 14, 2007). The fact that Dr. Donlan stated that claimant's pre-existing conditions contribute to the overall impairment is insufficient to meet employer's burden. *See, e.g., Beckner v. Newport News Shipbuilding & Dry Dock Co.*, 34 BRBS 181 (2000). Moreover, Dr. Donlan did not properly quantify the level of impairment resulting from the asbestosis alone. Utilizing the "subtraction method" of arriving at an impairment rating due solely to the work injury is legally insufficient. *Carmines*, 138 F.3d at 134, 32 BRBS at 48(CRT); *see also Pounders*, 326 F.3d 455, 37 BRBS 11(CRT); *Winn*, 326 F.3d 427, 37 BRBS 29(CRT). Consequently, we affirm the administrative law judge's conclusion that Dr. Donlan's opinion cannot serve as a basis for Section 8(f) relief as it is rational, supported by substantial evidence, and in accordance with law. The administrative law judge's denial of Section 8(f) relief is therefore affirmed. *Pounders*, 326 F.3d 455, 37 BRBS 11(CRT).

Accordingly, the administrative law judge's Decision and Order is affirmed.

SO ORDERED.

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NANCY S. DOLDER, Chief
Administrative Appeals Judge

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REGINA C. McGRANERY
Administrative Appeals Judge

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JUDITH S. BOGGS
Administrative Appeals Judge